No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

JOSEPH FURROW,
Petitioner,

vs.

BARRY A. BISSON,
Respondent.

SUPPLEMENTAL APPENDIX

JANICE R. MAZUR, S.B.N. 144611
MAZUR & MAZUR
One America Plaza
600 W. Broadway, Suite 1400
San Diego, CA 92101
(619) 231-0855

Attorneys of Record
for Petitioner Joseph Furrow

Bowne of Los Angeles, Inc., Law Printers (213) 627-2200

19pp

TABLE OF CONTENTS
SUPPLEMENTAL APPENDIX

APPENDIX C

C-1

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JOSEPH FURROW,
Plaintiff and Appellant,

vs.

BARRY A. BISSON,
Defendant and Respondent.

G013643
(Superior Court No. 552572)

OPINION

COURT OF APPEAL
4th DIST. DIV. 3
FILED
JUNE 21, 1995

Deputy Clerk

NOT TO BE PUBLISHED

Appeal from a judgment of the Superior Court of Orange County, James K. Turner, Judge. Affirmed.

Joseph Furrow, in pro. per., for Plaintiff and Appellant.

Barry A. Bisson, in pro. per., for Defendant and Respondent.

Joseph Furrow appeals from the judgment in favor of Barry Bisson, whom Furrow sued for legal malpractice and fraud based on Bisson's representation of him in an underlying legal malpractice suit against two other attorneys, Joseph Radzik and Yong Tsun Lee. Radzik and Lee separately represented Furrow in a wrongful termination of employment case against Fluor E & C (Fluor), which was dismissed for failure to bring it to trial within five years from the date of filing and complaint. The trial against Bisson was bifurcated; the jury found for Bisson on liability, and the court awarded damages to Bisson under his cross-complaint against Furrow for breach of their retainer agreement and attorney fees. Furrow contends the jury verdicts are unsupported by substantial evidence; there were evidentiary and instructional errors requiring reversal; Bisson engaged in prejudicial misconduct during trial; and the award of attorney fees was an abuse of discretion. We affirm.

I. *Sufficiency of the evidence*

The evidence in the light most favorable to the judgment is as follows: In November 1975, Furrow filed a lawsuit against Fluor for wrongful termination, representing himself in propria persona. He later retained attorney Radzik, who represented him from November 1977 until Furrow dismissed him in January 1979. Furrow represented himself again until he retained attorney Lee in August 1979. In December 1979, Lee unsuccessfully moved to add Fluor's parent company as a defendant. Shortly thereafter, in January 1980, Lee filed an at-issue memorandum. Furrow dismissed Lee in June of 1980 and once again represented himself until the case was dismissed in January 1981 for failure to bring it to trial within five years. Furrow prepared a written agreement signed by him and Lee rescinding their retainer agreement and releasing each other from all claims and liabilities arising out of the case.

Furrow filed an action for legal malpractice and fraud against Radzik and Lee on February 24, 1982. On January 22, 1987, one month before the expiration of the five-year period, Furrow consulted Bisson about handling the upcoming trial and retained him on February 3. Furrow signed a retainer agreement agreeing to pay Bisson $70 an hour attorney time, and $15 an hour clerk time, plus 25% of the gross recovery after trial or 15% if settled. Furrow paid Bisson a retainer of $4,000 "to be billed against the fees incurred on an hourly basis . . . ." The agreement expressly recited that without the addition of a contingent fee, reasonable rates for attorney and clerk time were $125 and $30 per hour, respectively. The agreement included an attorney fees clause.

During the *Radzik and Lee* trial, Bisson and Radzik entered into a stipulation of facts including the information that Furrow had filed an action on December 12, 1979, in municipal court against Radzik for return of attorney fees on the grounds Radzik had negligently failed to process the case against Fluor. Based on the stipulated facts, the trial court ruled Furrow had failed to file his malpractice action against Radzik within the one-year statute of limitations. (Code Civ. Proc., § 340.6.) Bisson advised Furrow to drop the fraud cause of action against Radzik because Furrow had no facts to support it and Bisson was concerned that Radzik would sue Furrow for malicious prosecution. Furrow did so, and Radzik was dismissed from the lawsuit.

Lee testified he and Furrow had gone to law school together. While Lee had become a licensed attorney, however, Furrow had not. During the eight months Lee represented Furrow in the case against Fluor, they worked together on the legal issues. After Lee took the case, he went through the file and could not find an at-issue memorandum. They both looked at the Code of Civil Procedure and realized the case had to be brought to trial within five

years. After Lee filed the at-issue memorandum, he called the county clerk's office once in March and again in May of 1980 to inquire about the status of the case. Both times he was told the notice of a trial setting conference would be sent "in accordance with court schedules." When Furrow ordered Lee to substitute out of the case, in June 1980, Lee told Furrow bringing the case to trial was the most important thing he had to worry about.

The *Radzik and Lee* jury found Furrow knew he should have brought a motion to specially set the Fluor trial. It also found Furrow intended to release Lee from unknown claims when he executed the release agreement. Based on these findings, the *Radzik and Lee* trial court ruled the release was a complete defense to Furrow's action, and Lee was dismissed. Lee testified Furrow prepared the release agreement to keep Lee from pursuing a claim for additional attorney fees when Furrow forced him to substitute out of the Fluor case.

The jury rendered general verdicts in favor of Bisson on both the complaint and the cross-complaint. Both parties waived a jury trial on the issue of damages on the cross-complaint. The cross-complaint had two causes of action: one for breach of the retainer agreement and one for fraud based on Furrow's misrepresentation of the case to Bisson to induce Bisson to take the *Radzik and Lee* case to trial. Bisson substantiated 140 hours of time spent based on his paralegal's record of time, Furrow's testimony, and Bisson's own testimony.[1] After hearing evidence and argument, the trial court took the matter under submission and later issued its ruling by way of a minute order, awarding Bisson $5,800 plus costs on the breach of contract cause of action and denying attorney fees "as no proof was offered on such

[1]Bisson was unable to find any data to support the time spent.

issue." No damages were awarded on the fraud cause of action.

Furrow contends he presented a preponderance of the evidence to the jury to support his claims against Bisson, in effect asking us to reweigh the evidence in his favor. But Furrow misunderstands the role of a court of review: When confronted with a challenge to the sufficiency of the evidence to support a judgment, "the power of an appellate court begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the determination . . ." (*Bowers v. Bernards* (1984) 159 Cal.App.3d 870, 873-874, italics omitted.)

Here, there is ample evidence to support the jury's conclusion that a reasonable attorney would not have won the malpractice case against Radzik and/or Lee. Radzik prevailed on a statute of limitations defense.[2] Although Furrow criticizes Bisson for entering into the stipulation of facts on which Radzik's dismissal was based, Furrow does not suggest the stipulated facts were inaccurate or incomplete. Furrow also contends Bisson should not have advised him to drop the fraud cause of action against Radzik; but Furrow presents no facts to support the allegation of fraud. Lee prevailed on the release agreement which he was forced to sign by Furrow. This jury had the release before them and heard testimony about the facts and circumstances surrounding its execution. Their conclusion that Lee was released from Furrow's claim of malpractice is supported by substantial evidence.

The jury could also have concluded that the dismissal of the Fluor case was due to Furrow's own fault, rather than the fault of either Radzik or Lee. There was evidence that

[2]This determination was affirmed by us on appeal. (*Furrow v. Radzik, et al.* (Mar. 27, 1988) G005392.)

Furrow was managing the case even when he was represented by counsel, and Lee testified Furrow know about the five-year rule and that he had to bring the case to trial. This conclusion supports the jury's finding in favor of Bisson on the malpractice claim.[3]

Substantial evidence also supports the judgment for Bisson on the cross-complaint and the concomitant award of $5,800 as damages. Both the agreement itself and testimony support the conclusion that Bisson was to be paid a reduced hourly fee of $70, plus the bonus of a contingent fee if he won or settled the case. The evidence supports an award of $70 times 140 hours, or $9,800, less the $4,000 retainer, totaling $5,800.

II. *Irregularities During Trial*

During trial, Furrow cross-examined Bisson's paralegal about the retainer agreement between Furrow and Bisson after Bisson had established that he had given the paralegal a copy. Furrow then asked, "Did Mr. Bisson ever tell you that he had been reprimanded by the State . . . ?" Bisson interrupted with what was apparently a loud cry (Furrow describes it as "a loud roar like a wounded bear"), and the trial court ordered the parties into chambers. Furrow had apparently complained to the state bar in 1988 that, among other things, Bisson had disclosed a confidential communication to a third party by showing the retainer agreement to the paralegal. The state bar had investigated the complaints and had found no action necessary other than a warning letter to Bisson regarding the disclosure of a confidential communication. Bisson strongly objected to the implication in front of the jury that he had been reprimanded by the state bar for something relevant to the malpractice action.

[3]Furrow does not challenge the sufficiency of the evidence on the fraud claim.

The trial court agreed and admonished the jury that "there's no evidence presented to this court of any reprimand to Mr. Bisson by anybody. It was an unfortunate question. And you are to absolutely and completely disregard it, forget about it; it has nothing to do with the case, nor was it proven."

Furrow complains he was severely prejudiced by the trial court's corrective instruction to the jury and by Bisson's loud outburst, "making it appear plaintiff did something very wrong." He contends the trial court should have instructed the jury on the improper disclosure of the retainer agreement, insisting the jury should have been informed of this "serious breach of fiduciary duty." But the trial court was well within its discretion in finding the warning was not a reprimand, it was not relevant to the malpractice action, and it was highly prejudicial to Bisson.

Furrow also complains that the trial court refused several instructions he proposed. A review of the record reveals that these instructions were either withdrawn by Furrow, adequately covered by other instructions, or irrelevant to the issues in the case. For example, Furrow's proposed instruction on burden of proof and preponderance of the evidence was seven pages long and consisted of a laundry list of complaints Furrow had against Bisson, Radzik and Lee.

III. *Errors re Attorney Fees*

The trial court's minute order containing its ruling on damages was issued on September 30, 1992. The court did not award attorney fees under Civil Code section 1717 because no proof had been presented at trial. Bisson treated the minute order as a proposed decision and filed an objection on October 8, pointing out that Code of Civil Procedure section 1033.5, as recently amended, required that attorney fees be awarded as costs rather than damages. Because Judge Turner had left for an extended vacation, the pro-

posed minute order, and subsequently Bisson's objections, went to Department 1. Judge Smallwood first entered a judgment in accordance with Judge Turner's minute order on October 7, and his clerk mailed the notice of entry of judgment to the parties. Then, based on Bisson's objections, Judge Smallwood vacated that judgment on October 15.[4] On November 6, Judge Smallwood modified the judgment to award attorney fees "as an item of costs, pursuant to contract between the parties, in an amount to be determined in accordance with [Code of Civil Procedure] § 1033.5," and notice of entry of judgment was mailed by the clerk on November 9. Bisson filed his memorandum of costs, notice of motion and motion to set attorney fees on November 19, 1992.

After Judge Turner returned from vacation, he vacated Judge Smallwood's October 15 order, which had vacated the judgment signed on October 7. Judge Turner stated, "This Court meant that Judgment rendered originally by this Court to stand. The Court Trial on the damages issue took less than one day and there was no request made for a Statement of Decision." He then modified the judgment to strike the language denying attorney fees for failure of proof and ruled on Bisson's request for attorney fees. He found the original request in the November 19 motion[5] did not contain any amounts of time spent, so "the [Trial] Court has no basis on which to exercise its discretion in setting reasonable

---

[4]The order stated, "Court having received objections to the Court's Intended Decision orders the Judgment signed on October 7, 1992 vacated. Parties have 10 days after service of proposed judgment to file objections CRC 232(e). Objections re: attorney fees appear to be valid. Objections as to fraud portion of judgment may require a hearing."

[5]Furrow points out the superior court clerk has no record of this motion being filed, but he never actually contends it was *not* filed. Judge Turner expressly recited its filing in the minute order modifying the judgment.

attorney fees for trial preparation." Bisson filed an amended motion and declaration with the number of hours, but it was "not timely served and filed pursuant to [Code of Civil Procedure] § 1005(b).[6] Accordingly, Judge Turner denied the motion for attorney fees, "except that the Court will take Judicial Notice that the trial lasted for 20 days, and Mr. Bisson was personally present each day. Therefore, the Court awards the sum of $20,000.00 for reasonable attorney fees."

Furrow contends Judge Smallwood was without power to modify the original minute order issued by Judge Turner, arguing it was not intended as a proposed judgment but a final one. Whether or not it was intended as a final judgment, it became one when Judge Smallwood signed the formal judgment conforming to the minutes under section 635[7] on October 7, 1992. "The general rule is that once a judgment has been entered, the trial court loses its unrestricted power to change that judgment." (*Craven v. Crout* (1985) 163 Cal.App.3d 779, 782.)

For a limited time, however, the trial court can entertain a handful of direct attacks on the judgment, one of which is a motion to vacate the judgment and enter a different one where there is an erroneous legal basis for the decision. (§ 663.) Section 663a requires the moving party to file and serve a notice of his intention to so move, "designating the grounds upon which the motion will be made, and specifying the particulars in which the legal basis for the decision is not

---

[6]All subsequent statutory references are to the Code of Civil Procedure unless otherwise specified.

[7]That section provides: "In all cases where the decision of the court has been entered in its minutes, and when the judge who heard or tried the case is unavailable, the formal judgment or order conforming to the minutes may be signed by the presiding judge of the court . . . ."

consistent with . . . the facts," within 15 days of the clerk's mailing of the notice of entry of judgment.

Bisson's objections of October 8 to the original minute order suffice as a notice of intent to move under section 663, thereby conferring jurisdiction on either Judge Smallwood or Judge Turner to modify the judgment to correct the error regarding attorneys fees.[8] Bisson's objections were filed within 15 days of the clerk's mailing of the notice of entry of judgment, and his papers clearly spelled out the legal error.

Furrow next argues the trial court could not properly award attorney fees because Bisson's motion to set attorney fees was untimely. But it was Bisson's amended motion that was ruled untimely. The motion filed on November 19, although incomplete, was timely. The California Rules of Court provided in 1992 that "[a]ny notice of motion to claim attorney fees as an element of costs under Civil Code section 1717 shall be served and filed before or at the same time the memorandum of costs is served and filed." (Cal. Rules of Court, former rule 870.2, adopted, eff. Jan. 1, 1987, repealed, eff. Jan. 1, 1994.) Rule 870(a)(1) required the filing of the memorandum of costs within 15 days after mailing the notice of entry of judgment. The judgment did not award attorney fees as an item of costs until November 6, and the notice of entry was mailed November 9. Thus the motion was filed at the earliest possible time.

The trial court does not have discretion to disregard noncompliance with the time requirements for a motion to set attorney fees. (*Russell v. Trans Pacific Group* (1993) 19 Cal.App.4th 1717, 1725-1726.) But because the original motion was timely, the trial court exercised its discretion on the award.

---

[8]Because both Judge Turner and Judge Smallwood modified the judgment to award attorney fees as an item of costs, it is immaterial for purposes of this appeal which modification stands.

The judgment is affirmed. Bisson is awarded costs on appeal.

WALLIN, J.

WE CONCUR:

SILLS, P.J.

SONENSHINE, J.

APPENDIX D

3022 Coleridge Dr.,
Los Alamitos, CA 90720
July 5, 1995

Honorable Edward Wallin,
Justice of The Court Of Appeal,
and Associate Justices,
Court of Appeal, Fourth Appellate
District, Division Three,
925 North Spurgeon St.,
Santa Ana, CA 92701

Re: G 013643 (Orange Co.
No. 552572)
Furrow v. Bisson

Dear Justice Wallin and Associate Justices:

Appellant respectfully requests that this Court take under review, its decision filed on June 21, 1995. The Court has power to review its decision on its own motion under California Rules of Court, *Rule 27(a)*.

As this Court knows, the case of *Trope v. Katz* (1994) 28 Cal.App.4th 1409, dealing with the important issue of attorney fees, (as is the issue in the above case), is pending in the California Supreme Court. The *Trope* case follows the Supreme Court's general rule, referred to as the Sten rule, in that attorney fees are not allowed to an attorney appearing in pro se.

It is also of significance that *Trope v. Katz* is supported in principle by the United States Supreme Court case *Kay v. Ehler* (1991) 499 U.S. 432, 111S.Ct. 1435, as well as cases in a number of Federal Courts.

In the very thorough Opinion presented in the *Trope v. Katz* case, that Court also states that the decisions in *Leaf v. San Mateo* (1984) 150 C.A. 3d 1184; *Renfrew v. Loysen*(1985) 175 C.A. 3d 1105; and *Dameshghi v. Texaco*

Refining & Marketing, Inc., departed from the general rule by basing their decisions on dicta, and therefore have no force as precedents, and cannot be controlling.

Respectfully,

/S/ JOSEPH FURROW
Joseph Furrow
Appellant/plaintiff

cc: Barry Bisson

APPENDIX E

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JOSEPH FURROW,
Plaintiff and Appellant,

v.

BARRY A. BISSON,
Defendant and Respondent.

G013643
(Super, Ct. No. 552572)
ORDER

COURT OF APPEAL
4TH DIST. DIV. 3
FILED
JULY 19, 1995

Deputy Clerk

The petition for rehearing is DENIED.
WALLIN, J.

I CONCUR:
SILLS, P.J.